Supreme Court, U.S.
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In the

Supreme Court of the United States

CALVIN LIMBOCKER,

Petitioner,

v.

LAURIE SMITH, Sheriff, Santa Clara County,
and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Could a two-judge panel of the Ninth Circuit have legally denied a motion for certificate of appealability, thus finally disposing of an appeal from a district court dismissal of a *habeas corpus* petition, where 28 U.S.C. §46 and Federal Rules of Appellate Procedure 27 do not permit a Federal Court of Appeals to authorize dispositive panels of less than three judges, and where the purported legal basis for disposition of the *habeas corpus* appeal by two-judge panel is not even a duly promulgated local rule, but a "general order" issued simply by the presiding judge?

2. Should the Ninth Circuit have granted a certificate of appealability on the issue of whether a California Superior Court Appellate Department was the highest available court in the State of California for purposes of pursuing a federal *habeas corpus* petition challenging a California misdemeanor conviction, where the only way to obtain review by any higher State court was by pursuing a state *habeas corpus* / collateral relief proceeding, where this court held, in *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999), that a federal *habeas corpus* petition would require the exhaustion of state discretionary remedies only if they were the State's ordinary appellate review procedure?

LIST OF ALL PARTIES

Petitioner

Calvin Limbocker, an individual.

Respondents

LAURIE SMITH, the Sheriff of Santa Clara County.
People of the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Calvin Limbocker respectfully petitions for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered June 12, 2002.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

The orders are unpublished. A copy of the orders of the Ninth Circuit and district court are attached as an appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: June 12, 2002.
2. Date of any order respecting rehearing: none.
3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Article I, Section 9. The Privilege of the Writ of *habeas corpus* shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

Fifth Amendment. No person shall be ... deprived of life, liberty, or property, without due process of law...

Fourteenth Amendment. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

United States Code

28 U.S.C. §46 Assignment of judges; panels; hearings; quorum ...

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. ...

28 U.S.C. § 2253. Appeal

(a) In a *habeas corpus* proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held....

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a *habeas corpus* proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rules of Appellate Procedure

Rule 1: Scope of Rules; Title (a) (1) These rules govern procedure in the United States courts of appeals.

Advisory Committee Notes, 1967 Adoption: ...Rule 47 expressly authorizes the courts of appeals to make rules of practice not inconsistent with these rules....

Rule 27: Motions .... (c) Power of a single judge to entertain motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding....

Circuit Advisory Committee Note to Rule 27-1

(3) Motions Acted on by Motions Panels

(c) Procedures for Disposition of Motions by the Motions Panel. All three judges of the motions panel participate in ruling on motions that dispose of the appeal. Other substantive motions are presented to two judges; if in agreement, they decide the motion....

Rule 47. Local Rules by Courts of Appeals (a)(1)...A local rule must be consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. §2072....

Ninth Circuit General Orders

6.3. Delegation of Authority to Dispose of Motions

g. Disposition of Two and Three Judge Motions

(1) The following motions may be presented to two judges rather than the full panel if only two are participating. Any

motions judge participating may vote to grant relief and so order. If all judges present agree that relief will not be granted, they shall so order:

i. request for certificate of appealability;

ii. for leave to proceed in forma pauperis in civil cases;

iii. for temporary injunctive relief pending further consideration by the panel; and

iv. for transcripts at government expense....

(3) Three judges shall participate:

i. whenever a motion results in the disposition of the case; or

ii. the panel chooses to publish its order....

12.6. Use of General Orders

These General Orders pertain primarily to the court's internal functioning and therefore do not have standing as rules of the court.

California Penal Code

Section 1471. Cases that may be transferred; Powers of transferee court. A court of appeal may order any case on appeal to a superior court in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies or the court of appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law....

California Rules of Court
Chapter I Rules on Appeal

Rule 28. Review by the Supreme Court (a) [Time within which court may order review]

(1) [On own motion] If no petition for review is filed, within 30 days after a decision of a Court of Appeal becomes final as to that

court the Supreme Court, on its own motion, may order review of the Court of Appeal decision....

(2) [On petition] Within 60 days after the filing, as provided in subdivision (b), of the last timely petition for review, the Supreme Court may order review of a Court of Appeal decision....

Chapter III Rules of Transfer of Municipal and Justice Court Appeals

Rule 62. Transfer (a) [Cases transferable] A Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the Court of Appeal on its own motion determines from an opinion of the appellate department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law....

Rule 63. Certification (a) [Authority to make] The superior court on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. The certification may be made by a majority of the judges of the appellate department. When there was a trial in the superior court, the judge who tried the case may make the certification....

STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT

1. Basis of jurisdiction in federal court

The basis for jurisdiction in the federal court in the first instance was 28 U.S.C. section 2254.

2. Statement of the Case

a. Proceedings in the State Courts

Following a jury trial, petitioner, a former deputy sheriff for the County of Santa Clara, was convicted of one count of Penal Code section 289.6 for allegedly engaging in oral sex with a jail inmate, a misdemeanor. Petitioner was sentenced to a four month jail term with no alternative programs allowed (straight time) plus three years of court probation. The surrender date has been stayed pending his continuing appeals and federal *habeas corpus* petitions.

Petitioner filed a timely appeal from his conviction. On February 23, 2000, the Appellate Department of the Santa Clara Superior Court, upheld his conviction.

Petitioner thereafter filed a motion with the Appellate Department under California Penal Code section 1471 and California Rule of Court 63 to certify the appeal for transfer to the Court of Appeals under Penal Code section 1471. The Appellate Department denied the motion.

Under California Rules of Court 28, while a petitioner has a discretionary review remedy to the California Supreme Court from a decision of a California Court of Appeals, there is no discretionary review remedy from a superior court denial of a section 1471 motion, or the failure of a Court of Appeals to order a transfer on its own motion under California Rules of Court 62.[1]

Since in his case there was no further appeal remedy in the state court system, petitioner then filed a *habeas corpus* petition in the

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[1] Under section 1471 and Rules 62 and 63, an appeal of a misdemeanor conviction can reach the Court of Appeals via direct appeal in one of two ways (a) if the Superior Court or Superior Court Appellate Department certifies the appeal to the Court of Appeals or (b) if the Court of Appeals, *on its own motion*, transfers the case to itself. There is no provision for the petitioner to file a motion in the Court of Appeals requesting transfer of an appeal from the Superior Court Appellate Department.

district court for the Northern District of California on May 11, 2000.

b. Proceedings in the lower Federal Courts

On October 9, 2001, the district court dismissed petitioner's *habeas corpus* petition for failure to exhaust state remedies; specifically, for failing to obtain a ruling from the highest court in the state, which the district court determined was the California Supreme Court. Although conceding that under California law, petitioner, a misdemeanant, had no direct appellate route to the California Supreme Court, the district court, relying on a decision of the Ninth Circuit in *Larche v. Simons*, 53 F.3d 1068 (9th Cir. 1995), held that petitioner had to pursue a collateral state *habeas corpus* procedure and secure a denial from the California Supreme Court before pursuing a federal *habeas corpus* petition.

Both the district court and the Ninth Circuit denied petitioner's motions for certificate of appealability. The Ninth Circuit did so by a two-judge motions panel established under a General Order (an unpromulgated local rule). Petitioner now brings this petition on the issue of whether a certificate of appealability should issue.

c. Facts concerning the underlying petition.

The district court did not reach the merits of the underlying petition, and the only issue presented here is the propriety of denying the certificate of appealability on the exhaustion issue. The underlying facts and issues are stated simply for the Court's information.

Defendant, who was working as a deputy sheriff and jail guard for the County of Santa Clara, was charged with having consensual oral sex with a *male* jail inmate[2], a misdemeanor. At his trial, the

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[2] The male inmate claimed to be a transvestite and actually testified disguised as a woman, but (even in California!) had not been permitted to so disguise himself while in the Santa Clara County Jail.

prosecution introduced evidence that petitioner had some years previously engaged in sexual conduct with two *female* jail inmates, which the prosecution offered to show that petitioner had a propensity to engage in sexual relations with jail inmates.

Petitioner testified on his own behalf, denying that he had engaged in sexual relations with the *male* inmate.

Under the state statutory scheme in question, proof of such prior sexual offenses only had to be shown by a preponderance of the evidence, although the charged offense had to be proven beyond a reasonable doubt. However, the trial court instructed the jury that if it found the prior offenses to be true, it could infer that petitioner was guilty of the charged offense.

Petitioner has raised Fifth and Fourteenth Amendment constitutional challenges to his conviction in the state appeals and in his federal *habeas corpus* petition on the grounds that:

(a) introducing evidence of the prior offenses solely to prove propensity (and the statutory framework on which it was based) violated his right to due process of law;

(b) there was no rational basis for inferring that petitioner would have the propensity to have sex with a *man* from evidence that he had engaged in sex with two *women*, and to permit the jury to do so violated his right to due process of law, and;

(c) the court's instruction permitted the jury to convict him on a preponderance of the evidence, in violation of his right to be convicted only upon proof beyond a reasonable doubt as guaranteed by due process of law.

ARGUMENT

1. The Supreme Court should grant certiorari because of the importance of the issues in this case.

This petition involves issues of substantial importance. The underlying appeal concerns the extent and scope of this court's recent

decision in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). While the particular issue, an extended challenge to a misdemeanor, is not common, misdemeanor challenges have resulted in very significant decisions by this Court, particularly in the First Amendment area. See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939) and *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 280 (1951). The Ninth Circuit's disturbing use of two-judge panels to dispose of appeals in *habeas corpus* cases, in apparent violation of federal statute and the Federal Rules of Appellate Procedure, affects all *habeas corpus* petitioners in the Ninth Circuit and is a matter of general concern that this Court has apparently not yet addressed. Underlying this are the substantive issues of the petition which, although not before the Court, are significant in themselves, as they involve the explicit use of prior acts solely to prove propensity to commit a crime, an issue that this Court has alluded to in past decisions but never directly addressed in prior opinions.

Because the issues involved go well beyond the particular petitioner's concerns, certiorari is appropriate.

2. The denial of the motion for certificate of appealability by a two judge panel violated federal statutory law, the Federal Rules of Appellate Procedure,and the Ninth Circuit's local rules.

28 U.S.C. §46(b) allows for panels of less than all the members of a Court of Appeals for "determination of cases and controversies." Each panel must consist

> "of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness."

28 U.S.C. §46(b). 28 U.S.C. §46 does not permit a Federal Court of Appeals to authorize dispositive panels of less than three judges.

The Federal Rules of Appellate Procedure are promulgated by the United States Supreme Court as "an integrated set of rules to be followed in appeals to the courts of appeals." FRAP Rule 47 allows the individual circuits to promulgate local rules of practice "not inconsistent with" the Federal Rules of Civil Procedure. Advisory Committee Notes to FRAP Rule 1.

FRAP 27(c) and section (1) of the Advisory Committee Notes to Circuit Rule 27-1 provides that a single judge cannot dismiss or otherwise effectively determine an appeal. Section 2(b) of the Advisory Committee Notes to Circuit Rule 27-1 provides that the motions panel is composed of ***three judges***, just like a panel that hears a case on its merits. Section 2(c) of the Advisory Committee Notes to Circuit Rule 27-1 provides that all three judges of the motions panel must rule on motions that are dispositive of an appeal. Two judges may only act if the motion is not dispositive of an appeal.

No statute, provision of the Federal Rules of Appellate Procedure, or even any of the Ninth Circuit's local rules allow a dispositive motion to be decided by less than a three judge panel. Obviously, a denial of certificate of appealability in a *habeas corpus* appeal is dispositive of the appeal since it terminates the appellate proceedings. The sole authority for allowing a two judge panel to deny applications for certificates of appealability is found in General Order 6.3(g)(1), an *unpromulgated* local rule. This rule puts a dispositive denial of a certificate of appealability in the same class with such minor matters as leave to proceed *in forma pauperis* in civil cases, temporary injunctive relief, and transcripts at government expense. This General Order (which apparently was not even voted upon by the judges of the Ninth Circuit, but merely issued by the office of the chief judge) trivializes appeals of denials of *habeas corpus* petitions and makes a mockery of 28 U.S.C. §46.

In a case decided under the previous *habeas corpus* statutes, the Ninth Circuit has implied that only a three-judge panel can limit the

number of issues in a certificate of appealability. *Van Pilon v. Reed,* 799 F.2d 1332 at 1335 (9th Cir. 1986)(any limitation of issues in a certificate of probable cause "is not jurisdictional and it authoritatively limits issues only when acted upon by a panel of three circuit judges." *Id.*, citing *Vicaretti v. Henderson,* 645 F.2d 100, 102 (2nd Cir.1980), cert. denied, 454 U.S. 868, 102 S.Ct. 334, 70 L.Ed.2d 171 (1981).) *Van Pilon* continues to be cited with approval, see *Lambright v. Stewart*, 220 F.3d 1022, 1025-1026 (9th Cir.2000).

The certificate of appealability procedure is abbreviated and often results in the sort of denials without reasons that the Ninth Circuit issued in this case. It is a poor substitute for an appeal that is made worse when only a two judge panel is assigned. Use of two judge panels is particularly pernicious for certificates of appealability because the standard for granting such a motion is a showing of a "substantial denial of a constitutional right" *Lowell v. Prunty* 91 F.3d 1358 (9th Cir. 1996), which simply requires a showing that "a reasonable jurist could rule in his favor" on a constitutional claim. *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 338, 77 L.Ed.2d 1090 (1983), accord, *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). The third judge might have been the reasonable jurist that disagreed with the other two. Indeed, (as suggested below) the Ninth Circuit's two-judge rule may well allow certain members of the Ninth Circuit to dispose of appeals that they do not agree with summarily and avoid the standards that the Ninth Circuit (and this Court) officially apply to certificates of appealability in *habeas corpus* cases.

3. The Ninth Circuit erred in denying the motion for certificate of appealability.

The issue before the Ninth Circuit was whether a reasonable jurist could find that, for purposes of reviewing a misdemeanor conviction in California, the Superior Court Appellate Department is the highest court in the State of California.

In very similar contexts, presumably reasonable jurists have indeed

found that the Superior Court Appellate Department is the highest court in California for misdemeanor convictions.

This Court has consistently found, in the analogous area of direct review or certiorari to the Supreme Court from the "highest available state court", that the Appellate Division of the Superior Court is the highest court in the state for purposes of misdemeanor conviction. See *Schneider v. New Jersey* [3], *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), and *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). In cases from other states involving appellate schemes similar to that applicable to California misdemeanor convictions, this Court has held similarly. See *Largent v. State of Texas*, 318 U.S. 418, 63 S.Ct. 667 (1943), *Niemotko v. Maryland*, and *Thompson v. City of Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

The California State courts uniformly hold that the Superior Court Appellate Department is ordinarily the highest court in a direct appeal from a misdemeanor conviction. In *In re Wallace* (1970) 3 Cal.3d 289, 90 Cal.Rptr. 176, 475 P.2d 208, the California Supreme Court held that appellate remedies for a misdemeanor conviction would be exhausted for purposes of filing a state *habeas corpus* petition if, following a decision affirming the conviction by the Appellate Division, petitioner applied to the superior court for certification of the case to the Court of Appeal under rule 63(b) of the California Rules of Court, and certification was denied, or certification was granted but the Court of Appeal refused to transfer the case. *Id.* 3 Cal.3d 289 at 292, citing *In re Panchot* (1968) 70 Cal.2d 105, 107, 73 Cal.Rptr. 689, 448 P.2d 385, and *In re Zerbe* (1964) 60 Cal.2d 666, 667, 36 Cal.Rptr. 286, 388 P.2d 182, 10 A.L.R.3d 840. In *Randone v. Appellate Department* (1971) 5 Cal.3d 536, 542, 96 Cal.Rptr. 709, 488 P.2d 13, the California Supreme Court applied the same rule to support their mandamus jurisdiction over a concluded appeal in a

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[3]"Schneider v. New Jersey" was the title given to four consolidated appeals, one of which was a case entitled *Young v. People of State of California*.

municipal court civil case, holding that petitioners had "exhausted all the available procedural measures on appeal" by appealing to the Superior Court Appellate Department, requesting certification of the appeal to the Court of Appeal, and having the Appellate Department deny certification. See also *In re Eichorn* (1998) 69 Cal.App.4th 382, 387, fn. 3, 81 Cal.Rptr.2d 535, (assuming that direct appeal of a misdemeanor conviction ends at the Appellate Department level), *People v. Shoup* (2001) 89 Cal.App.4th 420, 107 Cal.Rptr.2d 468, (holding that Court of Appeal has no jurisdiction over appeal of a misdemeanor conviction and that appeal must be taken to the Appellate Department of the Superior Court.)

The Ninth Circuit did not give reasons for denying a certificate of appealability, but apparently it and the district court relied solely on a Ninth Circuit decision, *Larche v. Simons*, in which, claiming that the issue was one of "first impression", the Ninth Circuit decided that the California Supreme Court is the highest court in the state for purposes of appealing misdemeanor convictions in California, even though the only way to reach the California Supreme Court was by way of an entirely collateral state *habeas corpus* proceeding. *Larche v. Simons* did not cite any of the above cases. However, after *Larche v. Simons* was decided, this Court decided *O'Sullivan v. Boerckel*, in which the Court held that exhaustion of state remedies would only require the exhaustion of state discretionary remedies if they were the State's ordinary appellate review procedure. In *Swoopes v. Sublett,* 196 F.3d 1008 (9th Cir. 1999), the Ninth Circuit recognized the significance of *O'Sullivan v. Boerckel* after this Court remanded the matter to the Ninth Circuit for further consideration in light of that case. An Arizona felon had filed a federal *habeas corpus* petition without filing a discretionary appeal from Arizona Court of Appeals to the Arizona Supreme Court. The Ninth Circuit had originally granted a certificate of appealability but affirmed the dismissal of Swoopes' *habeas corpus* petition in an unpublished memorandum opinion. Following remand, the Ninth Circuit overruled *Jennison v. Goldsmith*, 940 F.2d 1308, (9th Cir.1991) the main case relied on in *Larche v. Simmons*, holding:

> "*O'Sullivan* recast the manner by which we must ascertain whether state appellate procedures are "available" for exhaustion purposes. The import of *O'Sullivan* is that exhaustion is not required when a state declares which remedies are "available" for exhaustion. Arizona has done so."

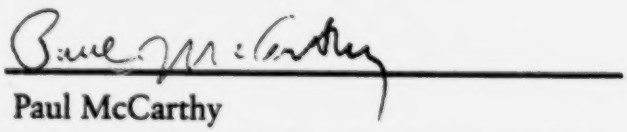
As a case arising out of Arizona, *Swoopes* did not address *Larche v. Simons*. However, the basic assumption of *Larche v. Simons*, that a federal *habeas corpus* petitioner must obtain a denial from the state's Supreme Court before filing a federal *habeas corpus* petition, no matter what state law may provide to the contrary, has been rejected. *Larche* followed the pre-*O'Sullivan* rule of *Jennison* that Federal courts must ignore the structure of the state's appellate system and insist that a state's Supreme Court be forced to rule on a petition before the federal courts will consider it. As the Ninth Circuit held in *Swoopes*, *O'Sullivan* has now changed the manner in which a federal court determines whether state appellate procedures are available for exhaustion purposes. California's history of treating the Superior Court Appellate Department as the highest court of the state for purposes of appealing a misdemeanor conviction is much longer and more extensive than Arizona's history of treating its Supreme Court as a purely discretionary court in appeals of criminal cases.

28 U.S.C. section 2253 requires that a petitioner seeking to appeal a denial of a *habeas corpus* petition apply to the district court for a certificate of appealibility. *Slack v. McDaniel, supra*, requires a "substantial showing of the denial of a constitutional right" with respect to each issue sought to be appealed. *Slack v. McDaniel*, 120 S.Ct. at 1603 (quoting 28 U.S.C. section 225 3 (c)). *Slack* followed the earlier decision of *Barefoot v. Estelle* in holding that the court should issue a certificate of appealability if the petitioner shows "that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." See also *Lambright v. Stewart*, 220 F.3d at 1026 ("This general principle reflects the fact

that the COA requirement constitutes a gatekeeping mechanism that prevents us from devoting judicial resources on frivolous issues while at the same time affording habeas petitioners an opportunity to persuade us through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit."). An intervening decision of this Court that undercuts the basis of prior Ninth Circuit decisional law would appear to be ample basis for granting a certificate of appealability for a petition that challenges that prior decisional law. Indeed, this seems so obvious as to suggest that the Ninth Circuit was not following its own standards when it denied petitioner's motion for certificate of appealability.

CONCLUSION

For the reasons given above, this court should grant certiorari.
Dated: Oakland, California, Friday, August 30, 2002.



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APPENDIX 1

FILED
JUN 12, 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALVIN LIMBOCKER, *Petitioner - Appellant,* v. LAURIE SMITH, Sheriff, Santa Clara County, et al., *Respondents - Appellees.*	No. 01-17368 D.C. No. CV-01-01 890-SI Northern District of California (San Francisco) ORDER

Before: RYMER and T.G. NELSON, Circuit Judges.

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

No motions for reconsideration, modification, or clarification of this order, or any further filings, shall be entertained or filed.

APPENDIX 2

FILED
NOV 21, 2001
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CALVIN LIMBOCKER, Petitioner - Appellant, v. LAURIE SMITH, Sheriff, Santa Clara County, et al., Respondents - Appellees.	No. C 01-1890 SI ORDER DENYING CERTIFICATE OF APPEALABILITY

Calvin Limbocker filed a petition for writ of *habeas corpus* to this Court on May 12, 2000. On October 9, 2001, this Court dismissed without prejudice Mr. Limbocker's petition for failure to exhaust state remedies. Petitioner subsequently filed a notice of appeal, which this Court construes as also requesting a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b).

When a petition for *habeas corpus* is denied on procedural grounds, a certificate of appealability issues when the petitioner demonstrates that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000). The Court finds that its procedural ruling would not be subject to debate among reasonable jurists, thus the request for a certificate of appealability is DENIED pursuant to 28 U.S.C. § 2253(c)(2). The Clerk shall forward to the court of appeals the case file with this order. See *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

IT IS SO ORDERED.

DATED: 11/15/01

SUSAN ILLSTON
United States District Judge

APPENDIX 3

FILED
OCT 10, 2001
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CALVIN LIMBOCKER, Petitioner - Appellant, v. LAURIE SMITH, Sheriff, Santa Clara County, et al., Respondents - Appellees.	No. C 01-1890 SI JUDGMENT

In accordance with the Court's Order of October 9, 2001, judgment is hereby entered.

IT IS SO ADJUDGED.

Dated: October 9, 2001

SUSAN ILLSTON
United States District Judge

FILED
OCT 10, 2001
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CALVIN LIMBOCKER, Petitioner - Appellant, v. LAURIE SMITH, Sheriff, Santa Clara County, et al., Respondents - Appellees.	No. C 01-1890 SI ORDER DISMISSING PETITION WITHOUT PREJUDICE FOR FAILURE TO EXHAUST STATE REMEDIES ENTERED IN CIVIL DOCKET 10/12/01

Respondent has filed a motion to dismiss Calvin Limbocker's petition for writ of *habeas corpus*, based on petitioner's failure to exhaust state remedies prior to filing the petition. The Court finds this motion appropriate for determination without oral argument pursuant to Local Rule 7-1(b), and the hearing set for October 12, 2001 is VACATED. Having considered the parties' submissions, and for the reasons set forth below, respondent's's motion is GRANTED, and the petition is DISMISSED WITHOUT PREJUDICE.

BACKGROUND

Petitioner was convicted of a misdemeanor in Santa Clara

Superior Court and sentenced to a four month jail term and three years of probation. See Petition for *habeas corpus*, 11. On February 23, 2000, petitioner appealed to the Appellate Division of Santa Clara Superior Court. See id at 13. When the Appellate Division upheld his conviction, petitioner moved to certify his appeal for transfer to the Court of Appeals for the Sixth District. sEE Petitioner's Opposition to Motion to Dismiss, Exhibit A. Petitioner asserts, and respondent concedes, that petitioner did exhaust his direct appeal remedies without reaching the California Supreme Court. See id. at 2:2-11; Respondent's Reply to Motion to Dismiss, 1:25-28. Although no clear statement of procedural history is found in the parties' briefs, it appears from the fact of the petition for writ of *habeas corpus* now before this court that petitioner's motion to transfer to the Court of Appeals was denied.

Mr. Limbocker then filed a petition for writ of *habeas corpus* to this Court on May 12, 2000. Respondent moved to dismiss, claiming petitioner had not exhausted available state remedies. The motion to dismiss is presently before this Court.

LEGAL STANDARDS

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the Oct or length of their confinement are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b),(c); *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981); *McNeeley v. Arave*, 842 F.2d 230, 231 (9th Cir. 1988). The state's highest court must be given an opportunity to rule on the claims even if review is discretionary. See *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1730 (1999). The exhaustion requirement does not demand repetitious application to the state courts, however; a petitioner need present his claims only once and need exhaust only one avenue

of relief See *Turner v. Compoy*, 827 F.2d 526, 528 (9th Cir. 1987), cert denied, 489 U.S. 1059 (1989). This is true even where alternative avenues of review are still available in state court. See id.

The exhaustion requirement is not jurisdictional, but rather a matter of comity. See *Granberry v Greer*, 481 U.S. 129, 133-34 (1987). However, a district court may not grant the writ unless state court remedies are exhausted or there are exceptional circumstances. See 28 U.S.C. § 2254(b)(1);*Edelbacher v. Calderon*, 160 F.3d 582, 585 (9th Cir. 1998). The appropriate time to assess whether a
prisoner has exhausted his state remedies is when the federal petition is filed. See id,; *Brown v. Maass*, 1 F.3d 914, 915 (9th Cir. 1993). If the petitioner exhausts after filing, he can bring that up in a subsequent petition. See *Gatlin v. Madding*, 189 F.3d 882, 882 (9th Cir. 1999).

A person challenging a misdemeanor conviction must present his claims to the California Supreme Court either by habeas or direct appeal in order to exhaust. See *Larche v. Simons*, 53 F.3d 1068, 1071 (9th (hr. 1995). If a misdemeanant's direct appeal is terminated before he reaches the California Supreme Court, he then must present his claims to that court in a habeas proceeding. Giving the California Supreme Court at least one opportunity to review petitioner's claim before he is heard in federal court furthers the interest of comity. See id.

DISCUSSION

Petitioner asserts, and respondent concedes, that plaintiff did exhaust his direct appeal remedies without reaching the California Supreme Court. See id. at 2:2-11; Respondent's Reply to Motion to Dismiss, 1:25-2:13. The Court therefore does not discuss exhaustion of direct appeals.

Turning to whether petitioner must appeal to the California Supreme Court by means of a writ of *habeas corpus*, it is well established that he does. The controlling case is *Larche v. Simons*,

53 F.3d 1068 (9th Cir. 1995). Larche contended that he was not required to present his claims to the California Supreme Court to exhaust his state remedies because he was a misdemeanant. See id. at 1071. The Court held that a misdemeanant must give a state's highest court the opportunity to review constitutional claims. See id. This is so, even when the court's review is discretionary. See id. Larche, therefore, lad Wed to exhaust his state remedies. See A at 1072. Petitioner, like Larche, was convicted of a misdemeanor. Like Larche, his direct appeal was exhausted before reaching the state's highest court. He therefore must present his constitutional claims to the California Supreme Court through the state habeas procedure.

Turning to petitioner's arguments why this Court should decline to follow controlling legal precedent in *Larche*, the Court finds they are without weight. The Supreme Court's decisions in *Talley v. California*, 362 U.S. 60 (1960) and *Schneider v. New Jersey*, 308 U.S. 147 (1939), do not contradict the doctrine of *Larche*. Those cases involve the Supreme Court's grant of certiorari. Neither discusses the exhaustion question presently before this Court; each devotes a single sentence to the proposition that the highest courts available to petitioners were, respectively, a county superior court and the appellate department of a county superior court. See: Talley, 362 U.S. at 6102; Schneider, 308 U.S. at 148. In this case, it is undisputed that the highest court available to petitioner on direct appeal was the California Court of Appeals, to which petitioner duly moved for transfer. It is true that a person petitioning for writ of *habeas corpus* need not necessarily pursue the writ in state court if he has presented his claims to the state supreme on direct appeal. Larche, however, commands that the California Supreme Court be presented once with a petitioner's constitutional claims if the exhaustion requirements is to be met. The Ninth Circuit cases to which petitioner refers in his opposition are consistent with this rule. Petitioner has not yet presented the California Supreme Court with his claims.

Petitioner argues that Larche has been superseded by the United States Supreme Court's decision in O'Sullivan v. Boerckel. Petitioner is mistaken. In *O'Sullivan*, the Supreme Court held only that the discretionary nature of review in a state's highest court does not render that review unavailable for the purposes of exhaustion See *O'Sullivan v. Boerckel*. 526 U.S. 838, 848. In fact, *O'Sullivan* stands for the proposition that the state's highest court must be given an opportunity to rule on the claims even if review is discretionary. See id. at 839-840.

Petitioner has not presented this Court with any argument for deviating from the clear command of the Ninth Circuit in Larche. Petitioner has failed to exhaust his state remedies as he must before bringing his petition for writ of *habeas corpus* before this Court. Accordingly, the petition must be dismissed.

CONCLUSION

For the foregoing reasons, respondent's motion to dismiss the-petition for writ of *habeas corpus* is hereby GRANTED, and the petition is DISMISSED WITHOUT PREJUDICE. Petitioner may file a new petition after exhausting his state remedies.'

Dated: October 8, 2001

SUSAN ILLSTON
United States District Judge

Petitioner is cautioned to comply with 28 U.S.C. § 2244, which imposes a one year statute of limitations on petitions filed by prisoners challenging non-capital state convictions or sentences.